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No. 85-562

In The

Supreme Court of the United States

October Term, 1985

RICHARD SPIKA, CHARLES KUEHNE, STEVEN POKORNY, RICHARD ENGEL, RICHARD SHAFER, DANF CUNY, FRANK PARTIPILO, RAYMOND CLARK, MARK GOUTY, PAUL NOLAN, ORIN WALKER, RICH MONTALTO, DANIEL NEUSTADT, DANIEL KELLY, BARBARA DURNIL, RICHARD STICKA, JOSE PEREZ, JAMES GLENNON, CHARLES GUTSMIEDL, Patrolman of the Village of Lombard, Illinois, and FRANK J. ESPOSITO, GLENN Q. FOSTER, SCOTT M. RYAN, MICHAEL J. TORRENCE, FRANK D. ANGILERI, ROBERT W. SISLEY, PETER J. DAVIS III, DANIEL A. MUSACCHIO, WILLIAM E. COLEY, JAMES A. PLUNKET, KWAPISZ, JAMES M. BARRON, GREGORY J. ORLANDO, MICHAEL J. DIRIENZO, RICHARD A. WARREN, DONALD V. HANLON, Firefighters of the Village of Lombard, Illinois,

Petitioners,

vs.

THE VILLAGE OF LOMBARD, ILLINOIS,

Respondent.

BRIEF IN OPPOSITION FOR RESPONDENT

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Petitioners,

vs.

THE VILLAGE OF LOMBARD, ILLINOIS,

Respondent.

BRIEF IN OPPOSITION FOR RESPONDENT

Respondent Village of Lombard, Illinois, respectfully prays that this Court deny the Petition for a Writ of Certiorari to review the judgment and opinion of the Court of Appeals for the Seventh Circuit in this proceeding on May 22, 1985.

REASON FOR DENYING THE WRIT

I. A LITIGANT'S FAILURE TO CHECK THE STATUS OF A CASE FOR SIX MONTHS, WHERE A MAGISTRATE'S REPORT AND RECOMMENDATION HAS ALREADY BEEN SUBMITTED TO THE DISTRICT COURT, IS NOT SUFFICIENT DILIGENCE WARRANTING F.R.C.P. 60(b) RELIEF TO REVIVE A RIGHT TO APPEAL OTHERWISE LOST PURSUANT TO F.R.A.P. 4(a)(1).

F.R.C.P. 77(d) provides that lack of notice of entry of a judgment does not affect the time to appeal prescribed in F.R.A.P. 4(a). Petitioners' attempt to circumvent the plain meaning of Rule 77(d) by invoking F.R.C.P. 60(b)(1) and (6), which states that a party may be relieved of a final judgment by reason of mistake, inadvertence, surprise, excusable neglect, or any other reason justifying relief from such a judgment.

However, petitioners can offer no reason, other than neglect, for their failure to file a timely notice of appeal. From November 29, 1983, the date of Magistrate's recommendation that respondent's Motion to Dismiss be granted, to May 24, 1984, petitioners did not make a single phone call to the district court clerk, inquiring as to the status of the case.

Petitioners contend that the Court of Appeals' decision, if allowed to stand, will result in the district court's being "inundated" with status requests from anxious practitioners. Respondent submits that such a scenario is a gross exaggeration, unsupported by any statistics or even estimates regarding the total number of open cases presently in the district court; or, of those open cases, the total number with pending motions; or, of those total pend-

ing motions, the total number of dispositive motions from the disposition of which the losing litigants would have thirty days to appeal.

The Court of Appeals' ruling is consonant with that of the majority of the other circuits to have considered the question. See, e.g., *Case v. BASF Wyandotte,* 737 F.2d 1034 (Fed. Cir.) (per curiam), *cert. denied,* 105 S.Ct. 386 (1984); *Wilson v. Atwood Group,* 725 F.2d 255 (5th Cir.) (en banc), *cert. dismissed sub nom. Stark v. Atwood Group,* 105 S.Ct. 17 (1984); *Jones v. Estelle,* 693 F.2d 547 (5th Cir. 1982) (per curiam), *cert. denied,* 460 U.S. 1072 (1983); *Hensley v. Chesapeake & O. Ry. Co.,* 651 F.2d 226 (4th Cir. 1981); *Scola v. Boat Frances, R., Inc.,* 618 F.2d 147 (1st Cir. 1980); *Hodgson v. United Mine Workers,* 473 F.2d 118 (D.C. Cir. 1972); *Weedon v. Gaden,* 419 F.2d 303 (D.C. Cir. 1969); *Wagner v. United States,* 316 F.2d 871 (2d Cir. 1963).

CONCLUSION

There are no special or important reasons for reviewing the case. The Petition for a Writ of Certiorari to review the judgment and opinion of the Court of Appeals of the Seventh Circuit should be denied.

Respectfully submitted,

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